

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-13

In the Matter of

Tariff Filing Requirements for
Interstate Common Carriers

NOTICE OF PROPOSED RULEMAKING

Adopted: January 24, 1992; Released: January 28, 1992

Comment Date: March 30, 1992

Reply Date: April 29, 1992

By the Commission:

I. INTRODUCTION

1. On August 7, 1989, AT&T Communications filed a complaint against MCI Telecommunications Corporation alleging that MCI is violating section 203 of the Communications Act of 1934 (the Act) by providing interstate common carrier telecommunications services to certain large business customers at rates and on terms and conditions not set forth in MCI's interstate tariffs. AT&T's complaint did not allege that MCI is violating Commission rules but, in essence, that certain Commission rules are unlawful. In particular, AT&T calls into question the Commission's longstanding forbearance rule, under which the Commission forbears from requiring nondominant interexchange carriers (IXCs) from filing interstate tariffs.

2. In a companion order adopted today, we deny AT&T's complaint in part and dismiss it in part, on the grounds that: (1) MCI should not be liable to AT&T for actions that were fully consistent with Commission rules; and (2) reconsideration of a fundamental rule, such as forbearance, which represents one of the cornerstones of the Commission's regulatory framework for the long-distance industry, should not occur in the context of an adjudication between two parties.¹ Because the issues raised in AT&T's complaint are serious and important

ones, however, we issue this Notice of Proposed Rulemaking to review the lawfulness and future application of our forbearance rules and policies.

II. BACKGROUND

3. In 1979, the Commission initiated the *Competitive Carrier* rulemaking proceeding in order to consider amendment of the tariff filing requirements for competitive common carriers, as well as other rule changes relating to facilities and service authorizations.² In the *Second Report and Order* in that proceeding, adopted in 1982, the Commission concluded that the Commission had authority under the Act to forbear from requiring nondominant IXCs to file interstate tariffs, and it adopted uncodified forbearance rules for certain resellers.³ One year later, in the *Fourth Report and Order*, the Commission extended forbearance to all nondominant IXCs.⁴ Today there are in excess of four hundred nondominant IXCs that offer common carrier services.⁵ Few, if any, of these carriers file tariffs for all of their service offerings, and most do not file any tariffs at all.

4. In concluding that forbearance rules for nondominant IXCs would be desirable and lawful, the Commission found that application of traditional section 203 tariff filing requirements to nondominant IXCs was both unnecessary and harmful. The Commission found these requirements to be unnecessary because nondominant IXCs, lacking market power, could not rationally charge rates, or engage in practices, that contravened the requirements of the Act.⁶ The Commission found tariff filing IXCs to be harmful on the grounds that such requirements inhibit price competition, service innovation, and the ability of firms to respond quickly to market trends.⁷ The Commission concluded that the Act does not require the Commission to use all Title II regulatory tools for all common carriers, and that if application of a particular regulatory regime to a particular class of carriers would frustrate the overriding goals of the Act, the Commission could and should forbear from applying that regime to that class of carriers.⁸

5. In the *Sixth Report and Order* in the *Competitive Carrier* proceeding, the Commission expanded upon the forbearance rules to *preclude* nondominant IXCs from filing any tariffs.⁹ This decision was appealed by MCI and reversed in 1985 by the United States Court of Appeals for the District of Columbia Circuit.¹⁰ In ruling that the Commission lacked authority to prohibit nondominant

¹ See *AT&T v. MCI*, E-89-297, FCC 92-36, adopted January 24, 1992.

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979).

³ 91 FCC 2d at 65. At that time, only terrestrial resellers and specialized common carriers were classified as nondominant. The Second Report and Order applied the forbearance rules only to terrestrial resellers.

⁴ 95 FCC 2d 554 (1983). The Commission also expanded the class of nondominant IXCs to include miscellaneous common carriers, domestic satellite carriers (domsats), domsat resellers, domestic operations of Western Union, international record carriers, other record carriers, and IXCs affiliated with exchange telephone companies. *Id.* at 557.

⁵ Summary of Long Distance Carriers, Industry Analysis Division, FCC, November 22, 1991, Table 1.

⁶ Second Report and Order, 91 FCC 2d at 69.

⁷ *Id.* at 65.

⁸ The Commission stated: "It is now well recognized that 'Congress could neither foresee nor easily comprehend the fast-moving developments in the field.' Therefore, this agency has been granted 'substantial discretion in determining both what and how it can properly regulate,' so long as it is exercised in a manner that effectuates rather than frustrates the overriding statutory goals." 91 FCC 2d at 65-66 (citations omitted).

⁹ 99 FCC 2d 1020 (1985).

¹⁰ *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1191 (D.C. Cir. 1985).

IXCs from filing tariffs, however, the Court expressly declined to address the lawfulness of permissive forbearance.¹¹

6. In 1990, subsequent to the Commission's *Competitive Carrier* decisions, the Supreme Court addressed the "filed rate" requirement of the Interstate Commerce Act. The Court said that the requirement in the Interstate Commerce Act that common carriers offer service only pursuant to filed rates was "utterly central" to the administration of that Act and could not be modified by the Interstate Commerce Commission.¹² The Court stated that "[w]ithout [these provisions]...it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, ... and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates."¹³ The Court stated further that "[a]lthough the [Interstate Commerce] Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, it does not have the power to adopt a policy that directly conflicts with its governing statute."¹⁴

7. Later that same year, however, Congress appears to have recognized the operation of our forbearance rule when it enacted the Telephone Operator Services Consumer Improvement Act of 1990.¹⁵ That Act requires operator service providers (which are common carriers) to file certain "informational tariffs" and to update them periodically. These informational tariff filing requirements are more lenient than the tariffing requirements of section 203 of the Act. In addition, Congress authorized the Commission to discontinue the informational tariff filing requirements after four years in the event the Commission finds these requirements no longer to be necessary.

III. DISCUSSION

8. In light of the occurrences described above and AT&T's complaint against MCI, we believe it appropriate to initiate a rulemaking proceeding to address the lawfulness of our forbearance policy. In addition, we will consider alternatives to this policy and how such alternatives might be implemented. Accordingly, we seek comment on the following issues:

- (a) Does the Commission have authority under sections 4(i) and 203 or other provisions of the Communications Act to continue to permit nondominant carriers not to file tariffs?
- (b) If the Commission's current forbearance rule is unlawful, does it necessarily follow that *all* common carriers must file tariffs? If not, for what classes of carriers is forbearance permissible and for what classes is it impermissible?
- (c) If the Commission's current forbearance rule is unlawful, should carriers be required to file any or all of their off-tariff service arrangements that are currently in effect? If so, in what time frame?

(d) If the Commission's current forbearance rule is unlawful, would any other Commission rules need to be changed, and if so, how should they be changed? If forbearance is found to be unlawful, should the streamlining rules in *Competitive Carrier* be relaxed to allow for additional streamlining for carriers currently subject to forbearance? If so, what sort of additional streamlining might be appropriate? What would be the implications of any proposed changes in Commission tariffing policies for small IXCs, users, and other affected entities? What would be the implications for competition in the marketplace?

IV. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.

B. Regulatory Flexibility Act

10. An Initial Regulatory Flexibility Analysis is contained in Appendix A.

C. Authority

11. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154, and 201-205.

V. ORDERING CLAUSES

12. IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

13. IT IS FURTHER ORDERED THAT pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules,¹⁶ comments SHALL BE FILED on or before March 30, 1992, and reply comments SHALL BE FILED on or before April 29, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dock-

¹¹ *Id.* at 1196.

¹² *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

¹³ *Id.* at 2769, quoting Regular Common Carrier Conference v.

United States, 793 F.2d 376, 379 (D.C. Cir. 1986)

¹⁴ *Id.* at 2770.

¹⁵ This Act is now codified as 47 USC § 226.

¹⁶ 47 C.F.R. §§ 1.415, 1.419.

ets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

14. For further information, contact Gary Phillips, (202) 632-4047, or Andy Lachance, (202) 632-4047, Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

Reason for Action

This rulemaking proceeding is initiated to obtain comment on the lawfulness of current forbearance rules in light of a complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act.

Objectives

The Commission seeks to review the lawfulness and future application of forbearance for interstate common carriers. It also seeks comment regarding what rules would need to be changed and how those rules should be changed if forbearance is found to be unlawful.

Legal Basis

The proposed action is authorized under sections 4 and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 201-205.

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Any rule change in this proceeding could have a significant impact on a broad range of telecommunications common carriers. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The notice does not propose new rules or alternative policies. It asks for comment on what rules should be changed in the event forbearance is unlawful, how these rules should be changed, and whether such changes should apply to all services and/or to all common carriers.